UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

CINCOM SYSTEMS, INC.	)	**Case No.** <u>1:22-cv-222</u>
55 Merchant Street	)	
Cincinnati, OH 45246	)	**(Judge** <u> </u>**)**
	)	
Plaintiff,	)	
	)	**COMPLAINT FOR MONEY**
-v-	)	**DAMAGES AND OTHER RELIEF**
	)	
GEMTALK SYSTEMS, LLC	)	<u>**JURY DEMAND**</u>
15220 NW Greenbrier Parkway	)	
Suite 240	)	
Beaverton, Oregon 97006	)	
	)	
Registered Agent:	)	
National Registered Agents, Inc.	)	
1209 Orange Street	)	
Wilmington, Delaware 19801	)	
	)	
Registered Agent:	)	
Shona M. Ing	)	
15220 NW Greenbrier Pkwy	)	
Suite 240	)	
Beaverton, Oregon 97006	)	
	)	
Defendant.	)	

Plaintiff Cincom Systems, Inc. ("Cincom"), by and through its attorneys, for its Complaint against Defendant GemTalk Systems, LLC ("GemTalk"), hereby alleges as follows:

This is a straightforward copyright infringement, breach of contract, and misappropriation of trade secrets action. Cincom owns, licenses, and holds copyrights for various software programs known as VisualWorks (the "VisualWorks software"). After GemTalk was given limited access to new versions of VisualWorks, Cincom discovered that GemTalk is now and has been illegally distributing components of VisualWorks to GemTalk customers. GemTalk

1

has been making these distributions to GemTalk customers without knowledge of Cincom and without any legal agreement that would permit such distributions.

PARTIES AND JURISDICTION

1.   Plaintiff Cincom Systems, Inc. is an Ohio corporation with its principal place of business located at 55 Merchant Street, Cincinnati, Ohio 45246.

2.   Defendant GemTalk is a Delaware limited liability company with its principal place of business located at 15220 NW Greenbrier Parkway, Suite 240, Beaverton, Oregon 97006. Upon information and belief, no member of GemTalk is a citizen of Ohio.

3.   Jurisdiction is proper in this Court under 28 U.S.C. § 1332(a) because the matter in controversy exceeds $75,000.00 and is between corporate citizens of different states.

4.   Jurisdiction is also proper in this Court under 28 U.S.C. §§ 1331 and 1338. This Court has supplemental jurisdiction over Cincom's state law claims under 28 U.S.C. § 1367, and jurisdiction is proper under Title 17 of the United States Code, §§ 101 *et seq.* governing copyrights.

5.   Venue is proper in this Court under 28 U.S.C. § 1391(a) because a substantial part of the events or omissions giving rise to the claims herein occurred in this judicial district.

6.   Personal jurisdiction is appropriate as to GemTalk because it does business within this judicial district.

STATEMENT OF FACTS

7.   Plaintiff Cincom is a software development company delivering call center software solutions, and licensing and support of manufacturing business control systems and software, database management systems, application development tools and office automation application products.

The VisualWorks Software

8.   Since 1999, Cincom has created, developed, owned, licensed, and held copyrights for various versions of the VisualWorks software. Cincom holds copyrights for each new version of VisualWorks. The relevant Certificates of Registration, attached hereto as **Exhibit A**, are:

- VisualWorks 7.8, Registration Number TX0007382714;
- VisualWorks 7.10, Registration Number TX0008071682;
- VisualWorks 8.0, Registration Number TX0008126038;
- VisualWorks 8.1, Registration Number TX0008231283;
- VisualWorks 8.2, Registration Number TX0008523343;
- VisualWorks 8.3, Registration Number TX0008567022;
- VisualWorks 9.0, Registration Number TX0009061881; and
- VisualWorks 9.1, Registration Number TX0009043084.

9.   Upon information and belief, beginning in 2013, GemTalk developed various application products that used Cincom's VisualWorks software. Specifically, GemTalk used the VisualWorks software to develop and implement its GemBuilder for Smalltalk/VW ("GBS") product, as well as other application products. In so doing, GemTalk incorporated and modified particular, critical lines of Cincom VisualWorks software source code into GemTalk's products, then distributed those products to its customers—all without permission from Cincom and without paying royalties for the privilege of so doing.

10.   GemTalk never requested written permission—and Cincom never gave GemTalk written permission—to use, develop, market, or distribute products containing the VisualWorks software source code in any way.

11.   As a result, and upon information and belief, GemTalk has improperly used the VisualWorks software, and has illegally used, marketed, licensed, developed, and distributed products that contain the VisualWorks software. In addition, GemTalk has improperly provided maintenance and support to third party users of the VisualWorks software.

The Cincom Smalltalk Developer Program Nondisclosure Agreement

12.   As a part of Cincom's VisualWorks software development, Cincom maintains a limited early-access product feedback program known as the "Cincom Smalltalk Developer Program" (the "Developer Program").

13.   The purpose of the Developer Program is to create an environment that allows VisualWorks customer developers to participate in the development of new versions of VisualWorks, in an effort to provide feedback to Cincom from its end-users.

14.   As a part of this program, Cincom provides participating developers with access to, among other things, new VisualWorks software builds, product updates, and a voice in the direction of ongoing product development.

15.   In order to participate in the Development Program, participants must execute a Nondisclosure Agreement with Cincom, in which they agree to keep any disclosed material under the Development Program confidential (the "NDA"). A true and accurate copy of the NDA template is attached hereto as **Exhibit B**.

16.   The Developer Program does not grant participants license to utilize the VisualWorks software in derivative programs; indeed, Paragraph 2 expressly states that "[n]o other purpose, right or obligation is implied by this Agreement. No license to the Information is granted by this Agreement. All Information provided hereunder … **may not be used for any other purpose than to provide feedback to Cincom for the ongoing development of the Products**." (**Ex. B** at ¶ 2 (emphasis added).)

17.   Paragraph 7 of the NDA provides:

Disclosee acknowledges that Cincom claims that the Information constitutes proprietary and confidential information of Cincom and that the protection of this Information is of the highest importance. **Disclosee shall keep the Information in strict confidence, shall take appropriate steps to ensure that persons**

authorized to have access to the Information refrain from any unauthorized reproduction, use, or disclosure of the Information, and shall restrict access to the Information to Disclosee personnel who need access to the Information to enable Disclosee to fulfill the purpose [of the Developer Program] and who have been advised of and have agreed to treat the information in accordance with this Paragraph 7. **Disclosee shall not copy, use, transfer, or otherwise disclose the Information, or any associated programs or materials derived or developed from the Information, without the express written approval of Cincom**, except that Disclosee may make two copies of the Information for internal use, for the purpose stated in Paragraph 2.

(**Ex. B** at ¶ 7 (emphasis added).)

18.   The Developer Program NDA terminates after a term of 365 days, but the confidentiality obligations survive the expiration or termination of the NDA. (**Ex. B.** at ¶ 3.)

19.   Beginning in 2012, certain GemTalk employees began participating in the Developer Program on behalf of GemTalk. Because of the NDA's one-year term, each GemTalk employee signed a new NDA annually upon the expiration of each one-year term of their respective NDA.[1] Each NDA contained the same terms and conditions enumerated in Exhibit B. Dates that GemTalk representatives executed the NDA include, but are not limited to:

- November 9, 2012;
- November 9, 2013;
- November 12, 2014;
- November 20, 2015;
- October 29, 2016;
- October 1, 2017;
- October 1, 2018;
- July 1, 2019;
- July 1, 2020; and
- July 1, 2021.

20.   The only authorized access and use of the VisualWorks software that Cincom has ever provided to GemTalk was through the Developer Program, under the NDA.

---

[1] For purposes of this Complaint, the Agreement provided in Exhibit B is Cincom's template agreement. GemTalk employees, however, executed individual, identical versions of the template NDA on the dates indicated in Paragraph 19, and Cincom refers to these agreements collectively herein as the "NDAs."

21.   Nevertheless, despite being bound by the NDA's confidentiality and use restrictions, GemTalk and its employees have taken confidential VisualWorks software source code—disclosed to GemTalk under the Developer Program—and copied, used, distributed, and otherwise disclosed confidential VisualWorks software source code through the distribution of GemTalk's own software programs.

**Cincom's Discovery of GemTalk's Infringement and the January 26, 2022
Demonstration Agreement**

22.   In June 2021, GemTalk President and CEO Dan Ware contacted Cincom to gain new access for GemTalk to the Developer Program so that GemTalk could have access to new and upcoming releases of the VisualWorks software. As negotiations continued during the summer of 2021 and culminating in early 2022, Mr. Ware and other GemTalk representatives revealed that GemTalk had actually been distributing portions of the VisualWorks software within GBS to GemTalk customers.

23.   Upon discovering GemTalk's improper use, licensing, marketing, development, distribution, and maintenance/support of the VisualWorks software, Cincom gave notice of GemTalk's improper conduct.

24.   In response to Cincom's notice, GemTalk requested a copy of the VisualWorks software, purportedly to identify the VisualWorks components within GemTalk's products and to aid in resolution of this dispute.

25.   Accordingly, on or about January 26, 2022, Cincom and GemTalk entered into a Software Demonstration Agreement ("Demonstration Agreement"). A true and accurate copy of the Demonstration Agreement is attached hereto as **Exhibit C**.

26.   Under the Demonstration Agreement, Cincom disclosed a version of the VisualWorks software to GemTalk, granting GemTalk a license to use the VisualWorks software

6

"for demonstration purposes only …." (**Ex. C** at § 1.2.)

27.   The Demonstration Agreement was for a period of thirty days, upon completion of which GemTalk agreed to either execute a full license agreement or return the provided software and certify that it had discontinued all use. (*Id.* at § 1.3.)

28.   The Demonstration Agreement makes clear that "the Products constitute proprietary and confidential information of Cincom … [and] that the protection of this information is of the highest importance[.]" (*Id.* at § 4.1.)

29.   And, under Section 4.3, GemTalk agreed that it would "not transfer or otherwise disclose (i) the Products, (ii) any associated programs derived or developed from the Products, or (iii) the results of any benchmark tests run on the Products, without the prior express written approval of Cincom." (*Id.* at § 4.3.)

30.   Instead, after executing the Demonstration Agreement and during the thirty-day period that the Demonstration Agreement was in force, GemTalk released to the public via its website—for download and distribution—a new version of its GBS product, incorporating the VisualWorks source code and in direct violation of the Demonstration Agreement.

31.   Since providing GemTalk with notice of its misconduct, Cincom has made numerous attempts to resolve this matter with GemTalk—but to date, Cincom has been unsuccessful in resolving this matter.

32.   As of the date of this filing, GemTalk continues to illegally use, market and distribute the VisualWorks software.

<div align="center">

COUNT ONE
(Copyright Infringement under 17 U.S.C. §§ 101, *et seq.*)

</div>

33.   Cincom realleges and reasserts the allegations contained in paragraphs 1 through 15 of this Complaint, as if fully rewritten herein.

34.   GemTalk has infringed Cincom's copyright interests in and relating to the VisualWorks software by using, marketing, licensing, developing, distributing products—and providing maintenance and support for products—that contain the VisualWorks software, including but not limited to GemTalk's GBS products.

35.   Specifically, GemTalk's improper use, marketing, licensing, development, distribution, and maintenance/support of the VisualWorks software was not licensed or in any way authorized by Cincom. GemTalk's actions constitute a copyright infringement as it violates the exclusive rights of Cincom to control the marketing, distribution and use of the proprietary and copyrighted VisualWorks software.

36.   GemTalk has infringed and is infringing Cincom's exclusive rights in the proprietary and copyrighted VisualWorks software by using, marketing and distributing the software without any kind of license or permission from Cincom, the copyright holder of all relevant versions of VisualWorks.

37.   GemTalk's copyright infringement is intentional and willful as GemTalk is fully aware that it did not and does not own the VisualWorks software and it is fully aware that it has never had any kind of license or permission from Cincom to use the VisualWorks software.

38.   GemTalk's ongoing copyright infringement is intentional and willful as Cincom brought this matter to the attention of GemTalk in June 2021, and despite the repeated attempts of Cincom to resolve this matter, GemTalk has refused to stop their infringing and unauthorized use of the VisualWorks software. GemTalk has failed to make reasonable concessions of any kind, all while continuing to use and to infringe on Cincom's copyrights of the VisualWorks software.

39.   As a result of the GemTalk's acts of copyright infringement, Cincom has

sustained damages in an amount to be proven at trial, but believed to be in excess of seventy-five thousand dollars ($75,000.00). Cincom continues to sustain damages on an ongoing basis due to GemTalk's continuing acts of copyright infringement.

40.   In addition, GemTalk's use and distribution of the VisualWorks software without a license from Cincom—both before and after receiving notice from Cincom—constitutes willful and intentional copyright infringement, entitling Cincom to attorneys' fees under 17 U.S.C. § 505.

41.   At all times relevant to this dispute, Cincom has taken all steps necessary to protect its copyrights in the VisualWorks software.

COUNT TWO
(Breach of Contract - Nondisclosure Agreements)

42.   Cincom realleges and reasserts the allegations contained in paragraphs 1 through 41 of this Complaint, as if fully rewritten herein.

43.   GemTalk employees and representatives and Cincom entered into annual Nondisclosure Agreements as part of the Developer Program. At the time each NDA was executed, a contract was formed between the parties, the confidentiality obligations of which have never expired.

44.   Pursuant to the NDA, GemTalk agreed to not copy, use, transfer, or otherwise disclose the Information, or any associated programs or materials derived or developed from the VisualWorks software disclosed to its developers.

45.   Instead, GemTalk incorporated confidential and proprietary Cincom VisualWorks software source code into its own products, which it then proceeded to use, market, and distribute without license or permission of any kind from Cincom and in direct violation of GemTalk's obligations under the NDA.

46. As a result of GemTalk's breaches of the NDA, Cincom has sustained damages in an amount to be proven at trial, but believed to be in excess of seventy-five thousand dollars ($75,000.00).

COUNT THREE
(Breach of Contract - Demonstration Agreement)

47. Cincom realleges and reasserts the allegations contained in paragraphs 1 through 46 of this Complaint, as if fully rewritten herein.

48. On or about January 26, 2022, Cincom and GemTalk entered into the Demonstration Agreement.

49. Under the Demonstration Agreement, GemTalk agreed to not transfer or otherwise disclose the VisualWorks software or any associated program derived or developed from the VisualWorks software.

50. GemTalk instead released to its public website a new version of its own program incorporating the VisualWorks software source code during the term of the Demonstration Agreement.

51. As a result of GemTalk's breaches of the NDAs, Cincom has sustained damages in an amount to be proven at trial, but believed to be in excess of seventy-five thousand dollars ($75,000.00).

COUNT FOUR
(Misappropriation of Trade Secrets under the Ohio Uniform Trade Secrets Act)

52. Cincom realleges and reasserts the allegations contained in paragraphs 1 through 41 of this Complaint, as if fully rewritten herein.

53. Cincom's VisualWorks software contains information and intellectual property that is not generally known to the public or to other persons who can obtain their secrecy, derives

independent economic value from its disclosure or use, is the subject of efforts by Cincom to maintain its secrecy, and derives independent economic value from not being generally known. Therefore, the VisualWorks software source code constitutes a "trade secret" under the Ohio Uniform Trade Secrets Act, O.R.C. §§ 1333.61, *et seq*.

54.   GemTalk has misappropriated Cincom's VisualWorks software source code by acquiring, using, marketing, licensing, and distributing the VisualWorks software when GemTalk knew or should have known it was using the VisualWorks software without a license and without any authorization from Cincom. In addition, GemTalk has included VisualWorks software source code within a derivative product that it has made publicly available on the internet.

55.   By using Cincom's VisualWorks software source code, GemTalk has exercised wrongful control and dominion over Cincom's proprietary and copyrighted VisualWorks software in a manner that is wholly inconsistent with Cincom's rights and which forecloses Cincom's ability to control and license the VisualWorks software as Cincom sees fit.

56.   As a result of GemTalk's misappropriation of the VisualWorks software source code, Cincom has sustained damages in amount to be proven at trial, but believed to be in excess of seventy-five thousand dollars ($75,000.00). Cincom continues to sustain damages on an ongoing basis due to GemTalk's continued misappropriation of the VisualWorks software.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Cincom Systems, Inc. requests that this Court enter judgment in its favor and award the following relief:

(a)   Under Count One, award Cincom actual, compensatory, and statutory damages in an amount to be proven at trial, as a result of GemTalk's copyright infringement of the VisualWorks software;

11

(b)   Under Count Two, award Cincom actual and compensatory damages in an amount to be proven at trial as a result of GemTalk's breaches of the NDAs;

(c)   Under Count Three, award Cincom actual and compensatory damages in an amount to be proven at trial as a result of GemTalk's breach of the Demonstration Agreement;

(d)   Under Count Four, award Cincom actual and compensatory damages in an amount to be proven at trial as a result of GemTalk's misappropriation of the VisualWorks software;

(e)   On all Counts, award Cincom any profits realized by GemTalk that were gained through its unauthorized use of the VisualWorks software;

(f)   On all Counts, issue a preliminary or permanent injunction, and other temporary or equitable relief, barring GemTalk from (i) continuing to use the VisualWorks software without a license from Cincom and (ii) continuing to market, license, and distribute to third parties and the general public without a license from Cincom;

(g)   On all Counts, award Cincom its costs and attorneys' fees in pursuing this action; and

(h)   On all Counts, award Cincom any and all other relief that this Court deems just and proper.

Respectfully submitted,

/s/ Joseph M. Callow, Jr.

Joseph M. Callow, Jr. (0061814)
Collin L. Ryan (0095810)
Carson E. Miller (0100203)
KEATING MUETHING & KLEKAMP PLL
One East Fourth Street, Suite 1400
Cincinnati, Ohio 45202
Phone: (513) 579-6400
Fax: (513) 579-6457
jcallow@kmklaw.com
cryan@kmklaw.com
carson.miller@kmklaw.com
Attorneys for Plaintiff, Cincom Systems, Inc.

12

JURY DEMAND

Plaintiff demands a trial by jury.

/s/ Joseph M. Callow, Jr.
Joseph M. Callow, Jr. (0061814)

11595544